STATE OF MICHIGAN

COURT OF APPEALS

MATHIAS SPITZLEY and CATHERINE A. SPITZLEY,

Plaintiffs-Appellees,

v

PETRO FICAJ and ROMAN FICAJ,

Defendants-Appellants.

UNPUBLISHED
February 11, 2003

No. 236926
Roscommon Circuit Court
LC No. 00-721530-CH

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Defendants appeal as of right from an order enjoining them from interfering with plaintiffs' easement and declaring defendants' "notice of dishonor of deed restriction" void following a bench trial. We affirm.

This case arose when plaintiffs brought action to enforce their alleged right to access Houghton Lake through an easement across the north fifteen feet of defendants' lakefront lot 11 in the Golden Beach subdivision. The deed for lot 11 from the subdivision's original developers and in defendants' chain of title contained the following language:

> The Northerly 15 feet of said lot is hereby restricted for the use of the owners of any and all lots in the plat of Golden Beach for purpose of ingress and egress to Houghton Lake from Church Street to Houghton Lake, this use to be for foot traffic only, no motor vehicles, boat docking, picnicing, camping, or erecting of docks allowed. This area to be under the care, custody and control of said lot owners at all times.

Defendants' notice of the language in the prior deeds was uncontested at trial.

Plaintiffs own a back lot in the subdivision. Plaintiffs' family and other members of the subdivision used the easement continuously and without dispute from the 1960's until 1999, when defendants purchased lot 11. After purchasing the lot, defendants filed a "notice of dishonor of deed restriction" and placed a chain across the way. Defendants filed suit, and the trial court found that an easement had been created across the north fifteen feet of lot 11 and

enjoined defendants from interfering with plaintiffs' use of the easement. In addition, the court declared defendants' "notice of dishonor of deed restriction" null and void.

On appeal, defendants argue that the trial court erroneous applied the common law rule on reservations in an instrument of conveyance. Additionally, defendants argue that their predecessor in title did not intend to create an easement or exception, but created a license. We disagree.

This Court reviews factual questions for clear error, giving regard for the special opportunity of the trial court to judge the credibility of witnesses. MCR 2.613(C); *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 12; 596 NW2d 620 (1999). However, any underlying issue of law is reviewed de novo. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 344; 578 NW2d 274 (1998). A trial court's application of an equitable doctrine is also reviewed de novo. *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 309; 583 NW2d 548 (1998).

Defendants argue that the trial court erred because, as a matter of law, a deed cannot create a reservation for a stranger to the deed. The law is clear in Michigan that, "[a]n attempted reservation for the benefit of a stranger to the conveyance is ineffective." *Choals v Plummer*, 353 Mich 64, 71; 90 NW2d 851 (1958). Plaintiffs counter that the rule is antiquated. Nonetheless, it remains the law in Michigan. *Id.*

Three broad exclusions narrow the scope of the rule in Michigan. *Mott v Stanlake*, 63 Mich App 440, 442; 234 NW2d 667 (1975). First, a distinction is drawn between a "reservation," which reserves an interest for the grantor, and an "exception," which provides for a third party's interest. *Id*. at 443-444. When a grantor does not attempt a reservation, but rather creates an exception in favor of a third party, then the language of the deed is given its intended effect. *Id*. at 442, citing *Martin v Cook*, 102 Mich 267; 60 NW 679 (1894).

Second, the effect of the rule is also narrowed by recognition that a reservation clause might have been included to except from the deed those rights already granted to a third party. *Mott, supra*, 63 Mich App 443. See also *Martin, supra*, 102 Mich 269. If the exception was already carved out, title to the excepted thing does not depend on the instrument containing the reservation or exception. *Id*. at 273. Thus, the language of the deed may be considered as having the effect of recognizing, confirming, or preserving an existing right. 88 ALR2d 1199, § 6, p 1211.

Because the terms "reservation" and "exception" are often used indiscriminately, a third exclusion recognizes that the use of a particular word is not determinative of whether the clause is a reservation or exception. *Mott, supra*, 63 Mich App 442. "The crucial factor is the intention of the grantor and grantee." *Id.*, citing *Martin, supra*, and *Choals, supra*. "[P]rovision for third parties makes the clause an exception rather than reservation." *Id*. at 444. Application of the rule requires a three-part analysis: (1) whether the conveyance contains ordinary words of reservation; (2) whether language of exception created or provided notice of a third-party's interest; and (3) whether there was an intent to create rights in a stranger to the instrument. *Choals, supra*, 353 Mich 69, 71; *Martin, supra*, 102 Mich 269, 272; *Mott, supra*, 63 Mich App 442-444.

In the instant case, the trial court held that the grantor clearly intended to create a foot-traffic easement for the benefit of the subdivision. Where there is clear intent by the grantor to create rights in a third party, the grant operates as an exception rather than a reservation. *Martin, supra*, 102 Mich 267. In addition, the grantor used the word "restriction" in the deed, not "reservation," and specified the third parties who held the right. Therefore, the grantor did not use ordinary words of reservation to reserve a right for himself. Accordingly, we find that the trial court's application of the law on reservations in an instrument of conveyance was proper.

Defendants also argue that the grantor did not show clear intent to create a servitude. "Where the intent to create an easement is not clear, the issue is to be resolved in favor of use of the land free of an easement." *Forge v Smith*, 458 Mich 198, 209; 580 NW2d 876 (1998). However, the circumstances surrounding a grant may be presented to ascertain the intent of the parties. *Powers v Hibbard*, 114 Mich 533, 554; 72 NW 339 (1897). "The intent of the plattors should be determined with reference to the language used in connection with the facts and circumstances existing at the time of the grant." *Dobie v Morrison*, 227 Mich App 536, 540; 575 NW2d 817 (1998).

Our review of the record reveals that trial testimony regarding the grantor's intent and actions at the time of the grant indicated an easement was intended for the benefit of the whole subdivision. The tax assessor testified that lot 11's tax assessment was lowered to account for the easement. In addition, trial testimony concerning the actions of the grantor, a past owner of lot 11, and other lot owners in the subdivision in the years following the original conveyance of lot 11 indicated that the easement was commonly used, and all parties accepted the easement. From this latter evidence, we can reasonably infer that the grantor and grantee would have made it known if the subdivision residents were acting in a manner inconsistent with the intent at the time of the conveyance.

In light of the fact that the language restricting the developers' deed of lot 11 did not use ordinary words of reservation, but rather indicated an intent to except an easement for the benefit of all owners of the subdivision, taken together with the evidence adduced at trial regarding the grantor's intent to create an easement, we find that the trial court properly held that a walking easement for access to Houghton Lake was intended and created.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio